

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

OLEN MIDKIFF and
LINDA MIDKIFF,

Plaintiffs,

vs.

3M COMPANY, AS SUCCESSOR BY
MERGER TO MINNESOTA MINING
& MANUFACTURING COMPANY
AND/OR ITS PREDECESSORS/
SUCCESSORS IN INTEREST
MINE SAFETY APPLIANCES

Defendants.

Case No. 4:08-CV-01219 DJS

JURY TRIAL DEMANDED

**PLAINTIFFS OBJECTION TO DOCTORS BRUCE AND GAYLE AS EXPERT
WITNESSES.**

Come now Plaintiffs in the above styled cause and file this objection to the Defendant's calling either Dr. Robert Bruce or David Gayle as expert witnesses because they have not been properly designated and were never designated by the Defendant.

I.

This is not a new issue to this Court. In this case, MSA had failed to designate experts despite being given two extensions. Expert designations were originally due on April 5, 2010. The parties agreed to an additional extension until May 28, 2010. MSA did not designate experts before either of these two dates. MSA filed a motion for leave to amend its designation of expert witnesses on August 5, 2010 but included only one expert in its request, Dr. Neil Ettinger, a pulmonologist. Court Document 84. When MSA discovered it had failed to designate any experts in this case, it filed a motion for leave to designate additional experts on August 13, 2010. Court Document 90. In the

spirit of cooperation, Plaintiffs did not oppose the motion because the Defendants had designated common experts to all cases in the companion cases of *Carl Scaggs v. 3M et al*; 4:08-CV-01163 and *Robert Firebaugh v. 3M, et al*, 4:08-CV-01161. These common experts were Dr. Jim Johnson (respirator), Dr. Sheldon Rabinowitz (respirator) and Dr. Neil Ettinger (medical). These three experts were common to all cases and it seemed reasonable to allow MSA to use these experts after Plaintiff learned that they were being retained in all cases.

Incredibly, despite having this Court grant its unopposed motion for leave to designate expert witnesses, MSA never designated any expert witnesses. MSA did not file or serve on the Plaintiff a designation of expert witnesses in this case after the motion was granted. Since the Plaintiffs already agreed to Johnson, Rabinowitz and Ettinger, Plaintiffs will not object to these experts. However, the Plaintiffs never received a designation of any other expert in this case. MSA never filed a designation of experts, even after obtaining leave to do so. Consequently, the Defendants attempt to call Dr. Gayle, Dr. Bruce or any other physician or expert unique to Mr. Midkiff must be disallowed because these experts were never designated. *Harris v. Steelweld Equip. Co.*, 869 F. 2d 396, 399 (8th Cir.) *cert denied*, 493 U.S. 817, 107 L. Ed. 37, 110 S.Ct. 70 (1989); *Accord Simplex Inc. v. Diversified Energy Systems, Inc.*, 847 F. 2d 1290, 1292 (7th Cir. 1988). Likewise, these experts were not common to all the cases and/or understood to be retained experts hired by MSA. These individuals, along with other medical experts, were unique to Mr. Midkiff and treated Mr. Midkiff under the specific facts of his case. They should have been designated in this case and Plaintiffs could not ascertain that they would be called because these witnesses either did not treat Mr.

Scaggs or Mr. Firebaugh or had circumstances surrounding their treatment that were dramatically different from the circumstances here. The Defendant should not be permitted to ambush Plaintiffs with late designations after having been given so many extraordinary opportunities to correct its errors.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

Pursuant to Rule 5 of the Federal Rules of Civil Procedure, I hereby certify that a true and correct copy of the foregoing document has been provided to all counsel of record and/or attorneys-in-charge via Certified Mail, Return Receipt Requested, and/or via facsimile, and/or via hand delivery, and/or via U.S. Mail on this the 14th day of January, 2011.

/s/ Mike Martin

MIKE MARTIN